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June 11, 2013

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Re: *San Jose POA and City of San Jose Interest Arbitration for Successor MOA*—Objection to City of San Jose's Reply Brief Re: Successor MOA
JAMS # 1110015552
File No. 039073

Dear Panel:

The San Jose POA objects to the "Reply Brief Re: Successor MOA" filed yesterday by the City. While Arbitrator Flaherty was emphatic that any reply briefs should be solely focused on factual inaccuracies (direction with which the POA complied in its Reply Brief), the City has inappropriately used its Reply Brief, with very little exception (and notwithstanding subheadings that suggest it is addressing factual inaccuracies) to provide further argument.

As Ms. Replogle stated in her May 10, 2013 e-mail to the parties:

> The parties shall submit … reply briefs of no more than 5 pages only for the purpose of *correcting any factual errors* in the briefs by **2:00 P.M. on Monday June 10, 2013**. [Italics added.]

(A copy of Ms. Replogle's e-mail is attached.)

Accordingly, the POA asks that the Panel not consider those portions of the Reply Brief that constitute argument, not factual clarification.

To aid the Panel, the POA has attached a version of the City's Brief striking through improper argument and ask that the Panel substitute this version for the one submitted by the City.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP

Gregg McLean Adam

GMA:jo
Enclosures
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From: Replogle Kristianne [kreplogle@jamsadr.com]
Sent: Friday, May 10, 2013 2:22 PM
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Cc: lruiz@publiclawgroup.com; Oliker, Janine
Subject: San Jose Police Officers Association vs. City of San Jose - REF# 1110015552

Dear Counsel,

Judge Flaherty asked me to email you the following:

To recap what was agreed to and made part of the record at the conclusion of the hearing and to avoid any ambiguity, the following schedule is in place.

Pursuant to Section 1111 of the city charter, subdivision (e), the Arbitration Board has directed the parties to submit a last offer of settlement **by 5:00 P.M. on May 22, 2013**. The offers shall be submitted by email to my assistant Kristianne Replogle at kreplogle@jamsadr.com.

After receiving both offers, she will transmit them to the intended recipient. The parties shall submit briefs of no more than 25 pages to the panel by **5:00 P.M. on June 5, 2013**, and reply briefs of no more than 5 pages only for the purpose of correcting any factual errors in the briefs by **2:00 P.M. on Monday June 10, 2013**. The Arbitration Board will convene June 11, 2013 at 2:00pm at the JAMS office located at 160 West Santa Clara Street, Suite 1600, San Jose, CA 95113 and will have 30 days from June 10, 2013 to render a decision consistent with the provisions of section 1111 of the city charter.

(The 30 day time period is derived from the JAMS Rules. Please advise if it conflicts with any charter provisions.)

Best,
Kristianne

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THE RESOLUTION EXPERTS

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IN INTEREST ARBITRATION PURSUANT TO SECTION 1111

OF THE SAN JOSE CITY CHARTER

In The Matter of Interest Arbitration Between

CITY OF SAN JOSE,

Employer,

and

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Association.

JAMS REF# 1110015552

CITY OF SAN JOSE'S REPLY BRIEF RE: SUCCESSOR MOA

Judicial Arbitration Mediation Services (JAMS)

Before: Hon. John A. Flaherty (Ret.), Chair
Alex Gurza, City Board Member
James Unland, SJPOA Board Member

Hearing Dates: May 6-8, 2013

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The SJPOA's Interest Arbitration Brief highlights why the wage and other issues for a successor MOA need to be resolved through a negotiated agreement rather than interest arbitration. The SJPOA immediately gets to the core of why this is so on page 2 of its Brief, where it states:

> Ultimately, however, it is not the City that decides this issue. San Jose voters have seen fit, through Charter Section 1111, to give this Arbitration Panel ("Panel") – not the Mayor, the City Manager, or the City Council – ultimate authority to decide issues such as those presented within the Charter parameters. (POA Brief, p. 2:7-10)

This is correct. But in giving this Arbitration Board the authority to decide disputed issues, San Jose voters also saw fit in Charter Section 1111 to set limits on what an Arbitration Board could award without the agreement of the City through negotiations. One of those limits is tied to the average tax revenue increase for the City in the 5 years preceding the arbitration, which is 1.24%. In its Brief, the POA concedes this is the correct calculation:

> The POA has not contested City Exhibit 3 and Ms. McCahan's calculations, (POA Brief, p. 3:20-21.)

Consequently, the POA devotes the majority of its Brief to attempting to argue that increasing current SJPOA wages by 10% is not really an increase but a "restoration" of past wages not subject to Charter Section 1111 criteria that the voters enacted. While the City has through its last proposal in negotiations offered a 9% compensation increase by the second year of the MOA, there is no factual or legal basis that would allow the Board to award a wage increase, even if called a "restoration", in violation of the San Jose City Charter.

I. THE SJPOA'S ASSERTION THAT THE 10% WAGE REDUCTION WAS SUBJECT TO "SUNSET" WITHOUT CONSIDERATION OF CHARTER SECTION 1111 CRITERIA IS FACTUALLY INCORRECT

The SJPOA alleges that the primary question before the Board is whether the 10% wage reduction in the December 7, 2011 Agreement on Wages and Terms should "sunset." In short, there is no factual support for this assertion. The SJPOA relies on testimony from SJPOA negotiator John Tennant to assert that a "sunset" of the 10% wage reduction was to be considered by the Board separately from a wage increase and without regard to Charter Section 1111 criteria other than comparability. This position is inconsistent with Mr. Tennant's actual testimony, and the clear language of the December 7, 2011 Agreement (JX 19). As SJPOA Counsel Gregg Adam put it, the parties "were originally [in 2011] going to arbitrate whether that 10 percent

concession would automatically end." (Tennant TR. Vol. II, 426:12-14) However, the parties ultimately negotiated an Agreement that did not include a "sunset provision", which was a "deal breaker for the City". (Tennant TR. Vol. II, 428:22-25; 429:1-4; 437:1-3; 438:19-22) Instead, the SJPOA knew it had the burden to justify a return of the 10% wage reduction. (*Id.*)

- The Agreement refers to "the 10% wage reduction," not a wage concession as asserted by SJPOA. (JX 19)
- The Agreement provides that the 10% "wage reduction" is to remain the "status quo." (JX 19)
- The Agreement states that the 10% wage reduction can be "modified" through mutual agreement or interest arbitration, not that it shall sunset through mutual agreement or interest arbitration. (JX 19)
- "Modified" means that the wage reduction could be changed, not that it would automatically be a 10% modification. (JX 19)
- The 10% wage reduction could be modified through the decision of an arbitrator pursuant to Section 1111 of the San Jose City Charter. There is no language in the Agreement that only certain provisions of Charter Section 1111 will apply to the arbitration of the wage reduction. (JX 19)
- The Agreement for interest arbitration is that the "issues of any successor agreement" should be resolved prior to the expiration of the MOA. Not, as the SJPOA contends, that only the issue of the 10% wage reduction would be decided prior to the expiration of the MOA. (JX 19)

While Mr. Tennant did focus his testimony on the comparability factor, he testified that he had not "seen Section 1111 in a while." (Tennant TR. Vol. II, 443:2-3) Moreover, he did not have the December 7th Tentative Agreement (JX 19) in front of him:

> Q. Do you have that document in front of you?
>
> A. I do not. I'm sorry. I do not. I'm at Stanford University. (Tennant TR. Vol. II, 430:1-3)

Furthermore, Mr. Tennant had no specific recollection of the email exchange confirming the December 7, 2011 Tentative Agreement (JX 20);

> Q. Do you remember this email exchange?
>
> A. Not specifically. But it sounds consistent with discussions that led to a culmination of an agreement. It's obviously some kind of communication between counsel. (Tennant TR. Vol. II, 435:16-19)

Most significantly, Mr. Tennant's testimony established that the SJPOA was aware of the changes to Charter Section 1111 and the need to meet the voter-adopted new standards.

> Q. There's a reference in here to the remaining status quo unless and until modified by mutual agreement or through the decision of an arbitrator pursuant to Section 1111 of the City Charter – the San Jose City Charter. What did you understand that part to mean?
>
> A. ....We're going to have to live with the new criterion under the Charter regarding comparables, which I believe now includes the other employees within the City that weren't there before, but not somehow that we were depriving the arbitrator of authority to restore the concession. (Tennant TR. Vol. II, 440:1-21)

The SJPOA's position through Mr. Tennant is that although the December 7, 2011 Agreement refers to the decision of the arbitrator being based on new Charter Section 1111, the Board can apply only the Charter Section 1111(e) on comparable wages in other jurisdictions. But the SJPOA abandons this position in its Brief. The SJPOA lists Charter Sections 1111(e), (f), and (g) as "Factors To Be Considered By The Panel," acknowledging that more than Mr. Tennant's comparability criteria must be considered. (SJPOA Interest Arbitration Brief, p. 3:4-24) When it reaches criterion Section 1111(g), the SJPOA wants the Board to ignore only this portion of Section 1111 based on its argument that increasing wages by a "sunset" of the wage reduction is not a wage increase. While creative, this is simply inconsistent with both Mr. Tennant's testimony and the clear language of the December 7, 2011 Agreement. Nowhere in the Agreement is there any reference to a "sunset" of the wage reduction or that Section 1111(g) will not apply to a wage increase that would add approximately $20 million to the City's ongoing budget.

II. THERE ARE MULTIPLE FACTUAL INACCURACIES IN THE SJPOA ARBITRATION BRIEF

While the City has identified a number of factual errors in the SJPOA brief, it is focusing here on only the most significant. The SJPOA's assertion that the City has offered nothing is wrong. (SJPOA Brief 1:19-21) While the last offer in interest arbitration is constrained by Charter Section 1111, the City's May 16 offer restoring 9% compensation and its willingness to continue negotiations is anything but a zero offer. Ms. Maguire's May 29, 2013 Memo recommends establishing an earmarked $10 million reserve solely for SJPOA wage increases. (JX 33) And while it is accurate that the City and SJPOA have not negotiated since the SJPOA's May 20 counter-proposal, what the SJPOA neglects to state is that their May 20 proposal for a 10.7% wage increase, 3% retention bonus, 80-hour annual leave cashout, and continuing sick

leave payout, appears to be an increase from its prior proposal.[1] (SJPOA Brief, 2:27) The SJPOA's statement that the City rejects the need to return police officer wages to the 2009 level is false. City Manager Figone acknowledged the salary and retention challenges impacting the SJPOA and the need to increase SJPOA wages, albeit in steps and responsibly based on revenue and budget projections.

In addition, the SJPOA's statement that City Manager Figone offered two budget impacts of a 10% wage increase while there are "hundreds, possibly thousands of ways to find available funds." (SJPOA Brief, 5:1-3) This disregards that the City has staffing and service obligations that could be eliminated but must be considered by the City Manager and Council in providing ongoing funding. Similarly, the assertion that the POA's last offer wage proposal "would only cost approximately $8 million" is factually inconsistent with the testimony demonstrating that just the 10% wage increase would exceed $20 million, before the additional costs of a retention bonus, leave cashout and sick leave payouts. (SJPOA Brief, 6:17-18) As JX 33 shows, the City is recommending an earmarked fund of $10 million dollars for its SJPOA compensation proposal, which exceeds the $8 million cost alleged by the SJPOA for the full 10% wage increase.

The SJPOA's argument that removing the vacation cap will not result in a compensation increase is incorrect. If more vacation hours are accrued, there is a cost to those additional vacation hours. With regard to the leave balance buydown, based on the SJPOA's argument that leave hours are not really a compensation increase because the officers are entitled to cash them out when they leave the department, the City's May 16 proposal added a 4% retention payment that is additional money. Contrary to the SJPOA's last offer, no other unions are receiving leave buydown options based on current agreements. As shown in the City's Post-Arbitration Brief, the remaining last proposals by the SJPOA must be rejected because of the undisputed fact that they exceed the Charter Section 1111(g) limit.

Finally, with regard to the SJPOA's proposal to eliminate the overtime cap regardless of the City's budget, the SJPOA is wrong in its contention that the Board must eliminate use of compensatory time in lieu of overtime payments. The SJPOA claims that there is no agreement in place to allow payment in compensatory time and therefore it would violate the FLSA to allow

[1] The City cannot negotiate against itself but remains available and intent on reaching a negotiated agreement outside of interest arbitration constraints.

the use of compensatory time. The terms of an expired MOA do not simply disappear; rather, those terms remain until modified by another agreement or interest arbitration. The role of the Arbitration Board is to set the terms/conditions of the successor MOA. The FLSA requires only that compensatory time be awarded pursuant to the provisions of a collective bargaining agreement, memorandum of understanding, or other agreement. (29 U.S.C. § 207(o)(2).) The fact that the Arbitration Board is determining the terms of the MOA does not preclude compensatory time. Removing the cap and allowing employees to choose cash or compensatory time without respect to the budget would increase the City's costs within the meaning of Charter Section 1111(f) and would therefore exceed the cap as calculated under Section 1111(g)(1).[2]

III. CONCLUSION

The City strongly prefers not to have to require the Arbitration Board to award the Charter-mandated City's last offers, as the Board must do if this matter proceeds to an award. The City, as stated throughout the arbitration hearing, believes that the SJPOA officers are devoted and valuable employees critical for the City's public safety. But the only way to avoid having the Arbitration Board award the City's last offers is to reach a negotiated agreement before the award is issued or during the 10-day period before the award becomes final.

Absent agreement, the Arbitration Board must follow the direction of San Jose voters to keep any award, as stated by the SJPOA, "within the Charter parameters." Consequently, the Section 1111 parameters require the Arbitration Board to select the City's last offers.

Respectfully submitted,

Dated: June 10, 2013

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[2] The SJPOA's citation to *White v. Davis* (2003) 30 Cal.4th 528, 578 is inapposite. *White* addressed a budget impasse, and held that the state must timely pay nonexempt employees their full salary for straight time worked and one and one-half times their regular rate for overtime. *White* does not involve the use of compensatory time or any issues germane to the present dispute.